IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 345 of 2003
In
OFFICIAL LIQUDATOR REPORT No. 24 of 2002
To
COMPANY APPLICATION No. 354 of 2003
In
COMPANY APPLICATION No. 24 of 2002
With
COMPANY APPLICATION No. 449 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANCHANBEN DHIRUBHAI TANDEL - Applicant(s)
Versus
O.L. OF VITTA MAZDA LTD. & 7 - Respondent(s)

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Appearance :
MR SUNIL C PATEL for Applicant(s) : 1,
MR RM DESAI for Respondent(s) : 1,
DS AFF.NOT FILED (N) for Respondent(s) : 2 - 4,6 - 8.
MR AMITBHAI KOTAK for Respondent(s) : 5,
MR ARVIND R YADAV for respondent No.3 of COMA 449/06

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 27/09/2006

ORAL JUDGMENT

Since in all these applications, the common question of law and facts arise for consideration, they are being disposed of by this common judgment and order.

2. Company Application No.345 of 2003 is filed for validating the sale transaction entered into between the applicant and the respondent company for purchase of plot No.78/14 for an amount of Rs.57,000/- and such validation is prayed under Section 536(2) of the Companies Act, 1956 (hereinafter referred to as “the Act”). The applicant has also further prayed for an appropriate order restraining the Official Liquidator of Vitta Mazda Limited (company in liquidation) (hereinafter referred to as “the Official Liquidator”) from selling the said plot in pursuance of the advertisement published in Gujarati daily “Gujarat Samachar” on 1-7-2003, advertising sale of the said plot or in pursuance of the orders passed by this Court in OLR No.24 and/or Company Petition No.126 of 2000. It is the contention on behalf of the applicant that he has purchased plot No.78/14 admeasuring about 441 sq mtr by registered sale deed dated 14-2-1991 for a sale consideration of Rs.57,000/-. It is also further

contended that the aforesaid sale deed was executed by one Shri Dara K. Deboo, the authorized Director of the company and the possession was handed over to him and since then he is in possession of the aforesaid plot in question. It is further submitted that for the plot in question, an advertisement was given for selling the said plot in view of the order passed by this Court and therefore, applicant has preferred the present application for regularizing the said sale in her favour as required under Section 536(2) of the Act as the said sale deed was after the presentation of the company petition for winding up of the aforesaid company.

3. Company Application No.346 of 2003 is filed by the applicant for regularization of the sale in his favour with regard to plot No.78/26 under Section 536(2) of the Act, which according to the applicant, he has purchased the same by registered sale deed dated 26-2-1991 for a sale consideration of Rs.23,253/-.

4. Company Application No.347 of 2003 is filed by the applicant for regularizing the sale in her favour with regard to plot Nos.7,8 and 56 under Section 536(2) of the Act, which according to the applicant, she has purchased

the same by registered sale deed dated 7-10-1991 for a sale consideration of Rs.1,93,131/-.

5. Company Application No.348 of 2003 is filed by the applicant for regularizing the sale in her favour with regard to plot No.78/15 under Section 536(2) of the Act, which according to the applicant, she has purchased the same by registered sale deed dated 7-6-1993 for a sale consideration of Rs.70,000/-.

6. Company Application No.349 of 2003 is filed by the applicant for regularization of the sale in his favour with regard to plot No.78/48-49 under Section 536(2) of the Act, which according to the applicant, he has purchased the same by registered sale deed dated 8-4-1991 for a sale consideration of Rs.53,000/-.

7. Company Application No.350 of 2003 is filed by the applicant for regularization of the sale in his favour with regard to plot Nos.9,10,11 and 12 under Section 536(2) of the Act, which according to the applicant, he has purchased the same by registered sale deed dated 15-4-1991 for a sale consideration of Rs.1,84,250/-.

8. Company Application No.351 of 2003 is filed by the applicant for regularizing the sale in his favour with regard to plot No.78/38-42 under Section 536(2) of the Act, which according to the applicant, he has purchased the same by registered sale deed dated 7-3-1993 for a sale consideration of Rs.60,000/-.

9. Company Application No.352 of 2003 is filed by the applicant for regularizing the sale in his favour with regard to plot No.78/241 under Section 536(2) of the Act, which according to the applicant, he has purchased the same by registered sale deed dated 21-1-1994 for a sale consideration of Rs.60,000/-.

10. Company Application No.353 of 2003 is filed by the applicant for regularizing the sale in her favour with regard to plot No.20 of 78/184 under Section 536(2) of the Act, which according to the applicant, she has purchased the same by registered sale deed dated 26-6-1992 for a sale consideration of Rs.51,500/-.

11. Company Application No.354 of 2003 is filed by the applicant for regularizing the sale in his favour with regard to plot No.78/50 under Section 536(2) of the Act,

which according to the applicant, he has purchased the same by registered sale deed dated 3-6-1994 for a sale consideration of Rs.39,000/-.

12. Company Application No.449 of 2006 is filed by the applicant for regularizing the sale in her favour with regard to plot No.78/105, Sector 2 of village Kathiria, admeasuring 257.50 sq mtr under Section 536(2) of the Act, which according to the applicant, she has purchased the same by registered sale deed dated 6-4-1993 for a sale consideration of Rs.41,500/-.

13. Shri Sunil C. Patel, learned advocate appearing on behalf of the respective applicants as well as Shri Rutvij Bhatt, learned advocate appearing on behalf of the applicant of Company Application No.449 of 2006 have submitted that all the applicants have purchased the aforesaid plots from the company by registered sale deed for a sale consideration and they are bona fide purchaser and that they are in possession of the respective plots in question and therefore, their possession should be protected and therefore, the sale transaction in their favour is required to be regularized in exercise of powers under Section 536(2) of the Act. Shri Patel,

learned advocate has heavily relied upon the decision of this Court dated 24-11-2005/16-3-2006 in the case of Damjibhai Laljibhai Shah and others V. Official Liquidator of Vitta Mazda Limited and others rendered in Company Application No.313 of 2003 and other cognate applications, by which this Court (Coram: R.M. Doshit, J.) has been pleased to regularize the sale transaction with respect to some of the plots which the applicants have purchased and according to the applicants, they are similarly situated. It is submitted that the applicants are also the purchasers of sub plot of survey No.78 and the applicants of those applications have also purchased the said plots like the applicants and when the sale transaction in their favour are regularized by this Court by the aforesaid order, it is requested to allow the present applications and to regularize the sale transactions in their favour under Section 536(2) of the Act.

14. All the applications are opposed by Shri RM Desai, learned advocate appearing for the Official Liquidator and the learned advocate appearing on behalf of the secured creditors. It is submitted on behalf of the opponents that there is no evidence produced by the

respective applicants with regard to payment of sale consideration. It is further submitted that the Official Liquidator has also not got any further material/records of the company, on the basis of which it can be said that the alleged sale consideration was paid to the company and it has been credited in the account of the company at the relevant time. It is also further submitted that statement of affairs is not filed by the concerned Directors, so far in this case as provided under Section 454 of the Act. It is submitted that the statement of affairs should indicate the affairs of the company in liquidation in prescribed form, verified by an affidavit and containing the particulars, namely (a) Assets of the Company, (b) its debts and liabilities, (c) the names and occupation of its creditors, (d) debts due to the company and (e) such further or other information. It is further submitted that in absence of the statement of affairs, the liquidator is not in a position to ascertain the debts and liabilities of the Vitta Mazda Limited. It is further submitted that on considering the sale deed, it appears that the sale consideration money might have been paid in cash. It is submitted that more than Rs.10,000/- was not permitted to be paid by cash. It is also further submitted that no construction of any kind

exists on the said property and according to the Official Liquidator the possession is with the liquidator. It is also further submitted that when the deed of sale was executed, attachment of the Income tax department was subsisting. It is further submitted by Shri Desai that the Official Liquidator has received one communication from the Income tax department pointing out that the sale transactions are void under the provisions of section 281(1) of the Act. It is also further submitted that with regard to some of the plots, more particularly, plot No.78/50 as well as plot No.78/38-42, there was already an undertaking by the company before the Maharashtra State Cooperative Appellate Court/ Tribunal to the effect that the aforesaid plots are unsold and they will not sell the same and in spite of the same and in clear breach of undertaking, the sale transaction has taken place. It is also further submitted that for such transactions, even this Court (Coram: R.M. Doshit, J.) has also dismissed the applications, which are found to be in breach of undertaking. At this stage, Shri Patel learned advocate appearing on behalf of the respective applicants has submitted that the undertaking was given in the month of July, 1993. However, the sale transactions with regard to plot No.78/38-42, was prior

to the undertaking and therefore, the same will not be hit by the undertaking. Shri Desai, learned advocate appearing for the Official Liquidator has heavily relied upon the decision of this Court (Jayant Patel, J.) dated 24-11-2005 rendered in Company Application No. 157 of 1999 and other cognate company applications by which this Court has not regularized the sale transactions with regard to plot out of survey No.78. It is submitted that the applicants of those applications have also purchased the plots like the applicants herein by similar sale deeds and the similar contention was raised with regard to bona fide purchaser and this Court (Coram: Jayant Patel, J.) by detailed judgment and order, has not regularized the sale transactions under Section 536(2) of the Act. Shri Desai has also relied upon one another decision of this Court (Coram: Ravi R. Tripathi, J.) dated 6-9-2002 rendered in Company Application No.213 of 2000 by which this Court has refused to regularize the sale transaction under Section 536(2) of the Act with regard to sub plot out of survey No.78 which was executed by the very company in liquidation. It is also further submitted by Shri Desai that the sale deeds are alleged to have been executed by one Shri Deboo, alleged to be the authorized Director. However, no resolution of the

company, authorizing said Shri Deboo to enter into the sale transaction has been produced on record. It is submitted that under the provisions of the Companies Act, any transaction and the affairs of the company are required to be backed by a resolution of the Board of Directors of the company and in absence of any resolution, the transaction is a nullity. He has relied upon the decision of this Court (Coram: H.L. Gokhale, J.) in the case of Rushvi Estate and Investments Private Ltd V. Official Liquidator of Shri Ambica Mills Limited reported in 2001(105) Company Cases, page 828. Shri Desai has also relied upon the decision of the Madras High Court in the case of Archean Granites Private Limited V. RPS Benefit Fund Ltd and others reported in 2006(2) Company Law Journal P. 1113 and has requested to dismiss the present applications.

15. Heard the learned advocate appearing on behalf of the parties.

16. It is not in dispute that M/s Vitta Mazda Limited was ordered to be wound up by this Court on account of the winding up proceedings of Company Petition No.126 of 1990. It is also not in dispute that all the sale

transactions are after the commencement of the proceedings of the winding up in the year 1990. On account of winding up order being passed by this Court in Company Petition No.126 of 1990, as per section 536(2) of the Act, any disposition of the property of the company made after the commencement of the winding up of the company, shall [unless the Tribunal/Court], otherwise orders be void. Under the circumstances, the presumption would be that the sale transaction after the commencement of the winding up proceedings, shall be void, unless otherwise ordered by this Court.

> ***"S.536(2) Avoidance of transfers, etc., after commencement of winding up:***
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> *In the case of a winding up by [the Tribunal], any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up shall, [unless the Tribunal/Court], otherwise orders be void.*

The intention of the legislature under Section 536(2) of the Act appears to see that no transaction after the commencement of the proceedings of winding up are given lawful effect, unless it is otherwise so

declared by the Company Court. The main purpose appears to be that once the winding up proceedings having been commenced no preferential payment be made by the company and/or company cannot be permitted to frustrate the winding up proceedings, which is facing the winding up proceedings.

17. Now considering the provisions of section 536(2) of the Act, unless the transaction is declared valid, such transaction would be void. Declaration of validity of the transaction is to be read as an exceptional category to the normal rule and such declaration may fall only if it is established to the fullest satisfaction of the Company Court that the transaction is genuine, bona fide and is not with a view to frustrate the rights of the other creditors. The transaction must be seen to the Court bona fide and free from all doubts, and the Court is prima facie required to consider the genuineness of the transaction. The applicant is also required to satisfy the Court that he has purchased the property for value in good faith and therefore, transaction is required to be protected.

18. In backdrop of above legal position, this Court is

required to consider, whether the applicants have been able to satisfy this Court with regard to genuineness of the sale transactions and that whether they have purchased the same for value. It is to be noted that none of the applicants have produced any evidence to show how the payment for sale transaction was made to the company. On considering the sale deed, nowhere it is mentioned how the sale consideration is paid. In some of the sale deeds, in last paragraph, it is stated and acknowledged that the amount has been received, however, no particulars are given how the payment is made. Even in some of the sale deeds, such an acknowledgment is also not there. It is the contention on behalf of the applicants that they might have paid the sale consideration by cash. However, no particulars are given by any of the applicants how the payment for consideration was made. It is also required to be noted that the payment of more than Rs.10,000/- by cash is not permissible under the law. Under the circumstances, the applicants have miserably failed to satisfy this Court that they have purchased the plots in question for value. It is also required to be noted that the Official Liquidator has specifically denied that the company had received the sale consideration. It is required to be

noted that none of the Directors have submitted any statement of affairs and even relevant records of company are also not available with the Official Liquidator. The accounts of the company and the relevant records are not traceable and/or not available with the company. Therefore, there is no evidence and/or material with the Official Liquidator and/or even with the applicants to show that the actual sale consideration has been received by the company and was deposited in the bank accounts of the company. The learned advocate appearing on behalf of the respective applicants has heavily relied upon the order passed by this Court (Coram: R.M. Doshit, J.) dated 24-11-2005/16-3-2006 passed in Company Application No.313 of 2003 and other cognate applications by contending inter alia that similar sale transactions with regard to some of the plot of survey No.78/the sale deeds are regularized. However, it is required to be noted that in the case before this Court (Coram: R.M. Doshit, J.), there was material before this Court with regard to payment of sale consideration and it is observed by this Court as under:

> *"In the present matters, the applicants have purchased the concerned parcels of the said land Survey No.78 by registered sale deed. It is the case*

of the applicants that they had paid the sale consideration in full by cheque/demand draft "

Thus, there was material before this Court (Coram: R.M. Doshit, J.) with regard to payment of sale consideration. However, as stated above, in the present case, the applicants have miserably failed to prove that they have actually paid the sale transaction and how the sale consideration was paid.

19. It is also required to be noted that all the sale deeds are executed by one Shri Deboo, alleged to be the authorized Director of the company. However, nothing is on record to show that any resolution was passed by the company and/or Board of Directors of the company authorizing said Shri Deboo to enter into sale transaction for and on behalf of the company. Considering the provisions of the Companies Act, more particularly, section 293(1), such a transaction without any resolution of the company is void and is a nullity.

20. While passing the order in Company Application No.157 of 1999 and other cognate applications, this Court (Coram: Jayant Patel, J.) has also considered whether selling of the plots out of survey No.78 was during the

course of a normal business transaction of the company or not and considering the registered sale deed, this Court has observed that selling of the plots by the company was not in regular course of business.

21. It is not in dispute that with regard to some of the plots, an undertaking was given by the company before the Maharashtra State Cooperative Appellate Court at Bombay in Appeal No.330 of 1993 and the company has declared that certain plots are unsold and they will not be sold by the company. Out of the present applications, at least three plots are covered by the said undertaking i.e. plot No.78/50 (Company Application No.354 of 2003) and plot No.78/38-42 (Company Application No.351 of 2003). Shri Patel, learned advocate appearing on behalf of the respective applicants is not in a position to dispute with regard to plot No.78/50, however, with regard to plot No.78/38-42, it is the contention of Shri Patel that both these plots are purchased prior to the undertaking i.e. 7-3-1993 and the undertaking was given somewhere i June or July 1993. It is to be noted that in spite of the above, in the undertaking before the Tribunal, the very company has stated that plot Nos.38 and 42 are unsold. This creates doubt in favour of the applicants and the

genuineness of the transactions and the said aspects are required to be considered by the Court while considering the regularization of the sale transaction under section 536(2) of the Act.

22. Considering the facts as stated hereinabove and on perusal of the sale deeds, the applicants have miserably failed to satisfy this Court with regard to payment of sale consideration and genuineness of the sale transaction. Under the circumstances, the decision of this Court (Coram: R.M. Doshit, J.) rendered in Company Application No.313 of 2003 and other cognate applications, relied upon by the learned advocate appearing on behalf of the respective applicants, would be distinguishable on facts, as in the case before this Court (Coram: R.M. Doshit, J.), the sale consideration was proved by payment of the same by cheque/demand draft. The case of the present case are squarely covered by the decision of this Court (Coram: Jayant Patel, J.) dated 24-11-2005 rendered in Company Application No.157 of 1999 and other cognate applications and even, otherwise on facts and the material on record, this Court is not satisfied with regard to genuineness of the sale transactions in absence of any proof with regard to

payment of sale consideration and therefore, all these applications are required to be dismissed. As stated above, with regard to plot No.78/50, the same is also required to be dismissed on the ground that the same is purchased in breach of undertaking. Similarly also plot No.78/38-42 is also required to be dismissed as the same is creating doubt and is in breach of the undertaking. Consequently, Company Application No.354 of 2003 as well as Company Application No.351 of 2003 are also required to be dismissed on additional ground.

23. For the reasons stated above, all these applications are dismissed. No costs.

(M.R.SHAH,J.)

shekhar/-